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Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2004

No. 04-770

STATE OF LOUISIANA, Petitioner

V.

QUINCY BROWN, Respondent

MOTION FOR LEAVE TO FILE *IN FORMA PAUPERIS*
BRIEF IN OPPOSITION
TO THE STATE OF LOUISIANA'S
PETITION FOR A WRIT OF CERTIORARI

Respondent respectfully asks leave to file the attached conditionally filed cross petition for a writ of certiorari without prepayment of costs and to proceed in forma pauperis.

Respondent has previously been granted leave to proceed in forma pauperis in the following court(s): the district court for the Parish of Orleans, the Louisiana Court of Appeals for the Fourth Circuit, and the Louisiana Supreme Court. Respondent's affidavit or declaration in support of this motion is attached hereto.

Respectfully submitted

G. Ben Cohen/pkw

G. Ben Cohen, La Bar No. 25370
Stephen I. Singer (La. Bar No. 27921)
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New Orleans, LA 70113
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COUNSEL FOR CROSS-PETITIONER

PROOF OF SERVICE

Undersigned counsel certifies that on this date, the 6th day of January, 2005, pursuant to Supreme Court Rules 29.3 and 29.4, the accompanying motion for leave to proceed *in forma pauperis* and the opposition to the petition for a writ of *certiorari* was served on each party to the above proceeding, or that party's counsel, and on every other person required to be served by depositing an envelope containing these documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

Hon. Eddie J. Jordan, Jr. District Attorney
Donna R. Andrieu, Esq. Assistant District Attorney,
619 South White Street
New Orleans, LA 70119

G. Ben Cohen /pp. KMV

G. Ben Cohen

No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

Quincy Brown — PETITIONER
(Your Name)

VS.

State of Louisiana — RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis.*

[X] Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

(1) Orleans Parish Criminal District Court, State of Louisiana

(2) Louisiana Fourth Circuit Court of Appeal (3) Louisiana Supreme Court

[ ] Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

Petitioner's affidavit or declaration in support of this motion is attached hereto.

Quincy Brown
(Signature)

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, _____, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	**Average monthly amount during the past 12 months**		**Amount expected next month**	
	You	Spouse	You	Spouse
Employment	$ 0	$ N/A	$ 0	$ N/A
Self-employment	$ 0	$	$ 0	$
Income from real property (such as rental income)	$ 0	$	$ 0	$
Interest and dividends	$ 0	$	$ 0	$
Gifts	$ 0	$	$ 0	$
Alimony	$ 0	$	$ 0	$
Child Support	$ 0	$	$ 0	$
Retirement (such as social security, pensions, annuities, insurance)	$ 0	$	$ 0	$
Disability (such as social security, insurance payments)	$ 0	$	$ 0	$
Unemployment payments	$ 0	$	$ 0	$
Public-assistance (such as welfare)	$ 0	$	$ 0	$
Other (specify): _____	$ 0	$	$ 0	$
Total monthly income:	$ 0	$ N/A	$ 0	$ N/A

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
N/A			$
			$
			$

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
N/A			$
			$
			$

4. How much cash do you and your spouse have? $ 0

Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
Louisiana State Penitentiary	Drawings	$ 5	$
"	Savings	$ 20	$
		$	$

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☐ Home
Value N/A

☐ Other real estate
Value N/A

☐ Motor Vehicle #1
Year, make & model N/A
Value

☐ Motor Vehicle #2
Year, make & model N/A
Value

☐ Other assets
Description N/A
Value

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
N/A	$	$
	$	$
	$	$

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
N/A		

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home) Are real estate taxes included? ☐ Yes ☐ No Is property insurance included? ☐ Yes ☐ No	$ N/A	$ N/A
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ N/A	$
Home maintenance (repairs and upkeep)	$ N/A	$
Food	$ N/A	$
Clothing	$ N/A	$
Laundry and dry-cleaning	$ N/A	$
Medical and dental expenses	$ N/A	$

	You	Your spouse
Transportation (not including motor vehicle payments)	$ 0	$ N/A
Recreation, entertainment, newspapers, magazines, etc.	$ 0	$
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$ 0	$
Life	$ 0	$
Health	$ 0	$
Motor Vehicle	$ 0	$
Other: _____	$ 0	$
Taxes (not deducted from wages or included in mortgage payments)		
(specify): _____	$ 0	$
Installment payments		
Motor Vehicle	$ 0	$
Credit card(s)	$ 0	$
Department store(s)	$ 0	$
Other: _____	$ 0	$
Alimony, maintenance, and support paid to others	$ 0	$
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ 0	$
Other (specify): _____	$ 0	$
Total monthly expenses:	$ 0	$ N/A

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☒ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☒ No

If yes, how much? _____

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☒ No

If yes, how much? _____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

Petitioner is currently incarcerated at the Louisiana State Penitentiary at Angola, Louisiana

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: April 28, 2004

Quinley Brown
(Signature)

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2004

No. 04-770

STATE OF LOUISIANA
Petitioner

V.

QUINCY BROWN,
Respondent

BRIEF IN OPPOSITION TO THE STATE OF LOUISIANA'S PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF LOUISIANA

G. Ben Cohen, La. Bar No. 25370
Stephen I. Singer, La. Bar No. 27921
Clive Stafford Smith, La. Bar No. 14444
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(504) 558-9867

ATTORNEY FOR RESPONDENT MR. BROWN

QUESTION PRESENTED RESTATED

Whether the Sixth Amendment's Grant of the Right To A Jury Trial – Incorporated and Applied to the States through the Fourteenth Amendment – Guaranteeing A Defendant The Right To A Jury Determination of Any Fact Used to Enhance The Sentence Beyond the Statutory Maximum, Renders it Unconstitutional to use a Civil Juvenile Adjudication to Enhance an Adult Sentence?

TABLE OF CONTENTS

QUESTION PRESENTED RESTATED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

BRIEF IN OPPOSITION 1

JURISDICTIONAL STATEMENT 2

STATEMENT OF THE CASE 4

STATEMENT OF FACTS 5

SUMMARY OF ARGUMENT 9

I. There Is No Need to Grant Certiorari as *Jones*, *Apprendi*, And *Blakely* Clearly Prohibit The Use Of Juvenile Judicial Adjudications To Enhance An Adult Sentence Beyond The Statutory Maximum 11

II. Mr. Brown's Juvenile Adjudication – *During Which He Had No Right to a Jury Trial* – Was Unconstitutionally Used to Enhance His Sentence 99 Years above the Maximum 22

CONCLUSION 28

TABLE OF AUTHORITIES

FEDERAL CASES

Almendarez-Torres v. United States, 523 U.S. 224 (1998) 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998) ..... passim

Apprendi v. New Jersey, 530 U.S. 466 (2000) ..... passim

Blakely v. Washington, 124 S. Ct. 2531 (2004) 20,23

Brown v. Louisiana, 125 S. Ct. 158 (2004) 4

Crawford v. Washington, ___ U.S. ___, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) 24

Duncan v. Louisiana, 391 U.S. 145, 20 L. Ed. 2d 491, 88 S. Ct. 1444 (1968) 12,16

Goldberg v. Kelly, 397 U.S. 254, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970) 26

Hannah v. Larche, 363 U.S. 420 (1960) 27

Harris v. Reed, 489 U.S. 255 (Kennedy, J., dissenting) 2

McMillan v. Pennsylvania, 477 U.S. 79, 91 L. Ed. 2d 67, 106 S. Ct. 2411 (1986) 16

Jones v. United States, 525 U.S. 227 (1999) ..... passim

Jones v. United States, 526 U.S. 227, 143 L. Ed. 2d 311, 119 S. Ct. 1215 (1999) 23

McKeiver v. Pennsylvania, 403 U.S. 528 (1971) 25

Michigan v. Long, 463 U.S. 1032 (1983) 2, 3

Monge v. California, 524 U.S. 721, 118 S. Ct. 2246, 141 L. Ed. 2d 615 (1998), ... 15,24

Mullaney v. Wilbur, 421 U.S. 684, 44 L. Ed. 2d 508, 95 S. Ct. 1881 (1975) 14,16

Patterson v. New York, 432 U.S. 197, 53 L. Ed. 2d 281, 97 S. Ct. 2319 (1977) 14,16

Ring v. Arizona, 536 U.S. 584 (2002) 22, 23

Sullivan v. Louisiana, 508 U.S. 275, 124 L. Ed. 2d 182, 113 S. Ct. 2078 (1993) 12

United States v. Gaudin, 515 U.S. 506, 132 L. Ed. 2d 444, 115 S. Ct. 2310 (1995) 12

Walton v. Arizona, 497 U.S. 639, 111 L. Ed. 2d 511, 110 S. Ct. 3047 (1990) 16

In re Winship, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970) 12,16

STATE CASES

In re C.B., 708 So. 2d at 396 2,3

In the Interest of D.J., 01-2149, 817 So. 2d 26 2,26

State v. Brown, 879 So. 2d 1276 (La., 2004) 2,4

DOCKETED CASES

State v. Brown, No. 2002-KA-1217 (La. App. 4th Cir. 5/29/03) 4

State v. Brown, 03-2788 (La. 07/06/04) 4

STATUES

La. R.S. 15:529.1 4

U.S. Const. amend. VI ..... passim

U.S. Const. amend. VIII ..... passim

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BRIEF IN OPPOSITION

Pursuant to Rule 15.3, respondent, Quincy Brown files this Brief in Opposition to the Application for Certiorari to the Louisiana Supreme Court.

JURISDICTIONAL STATEMENT

Mr. Brown does not concede jurisdiction, as it appears that a majority of the opinion issued by the Louisiana Supreme Court is predicated on analysis of state law, and the incorporation and application of federal jurisprudence to state law questions.[1] See State v. Brown, 879 So. 2d 1276, 1286-1290 (La., 2004) (holding "we continued to uphold *Dino's* decree that Art. I, § 2 of our State Constitution does not afford a juvenile the right to a jury trial in a juvenile proceeding. *State in the Interest of D.J.*, p. 13, 817 So. 2d at 34. Among our reasons for our continued holding is that even with the changes in the juvenile justice system, "there remains a great disparity in the severity of penalties faced by a juvenile charged with delinquency and an adult defendant charged with the same crime." Id. 817 So. 2d at 33. To allow these adjudications to serve as "prior convictions" for purposes of sentence enhancement for adult felony offenses would lessen this disparity and contribute to "blurring the distinction between juvenile and adult procedures." *In re C.B.*, 708 So. 2d at 396.").

While the Louisiana Supreme Court firmly and fairly applies this Court's jurisprudence in Apprendi v. New Jersey, 530 U.S. 466 (2000), a critical question before the Louisiana Supreme Court was not whether Apprendi applied in Louisiana but rather whether the Court believed in the

---

[1] The Louisiana Supreme Court repeatedly cited the Louisiana Constitutional Provisions, specifically Article I, Section 2 (due process) and Article I, Section 17 (jury trial) as basis for its decision. The Louisiana Supreme Court also refers to the analogous federal provisions. Whether these references are sufficiently "interwoven" to justify this Court's jurisdiction, and whether this Court should continue to rely on the presumption of jurisdiction identified in *Michigan v. Long*, 463 U.S. 1032 (1983) (holding that where "the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.") appears a fairly debatable question. Cf *Harris v. Reed*, 489 U.S. 255, 276 (Kennedy, J., dissenting).

unique role of the juvenile court:

> Under the guise of parens patriae, juvenile courts emphasize treatment, supervision, and control rather than punishment. . . . The hallmark of special juvenile procedures is their non-criminal nature. In re C.B., p. 17, 708 So. 2d at 400. Our state's juvenile system was founded upon the premise that retributive punishment was deemed inappropriate and the juvenile system dispositions should be individually tailored to address the needs and abilities of the juvenile in question. . . .

Id. at 1288. A healthy respect for the Louisiana Supreme Court's determination on how (or whether) it wanted to protect the civil nature of juvenile proceedings is warranted. *Cf* Michigan v. Long, 463 U.S. 1032, 1040 (1983) ("Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground. It is precisely because of this respect for state courts, and this desire to avoid advisory opinions, that we do not wish to continue to decide issues of state law that go beyond the opinion that we review . . .").[2]

To the extent the Court finds the mixed references to state and federal law sufficient to warrant the review of this Petition for Certiorari, Respondent files the ensuing *Brief in Opposition*.[3]

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[2] It is also unclear whether the issuance of this Court's mandate is made moot by the district court's recent re-sentencing of Mr. Brown – without objection or motion for stay – to the term of years provided in the Louisiana Supreme Court decision. It is not clear that the State would have the authority to re-sentence Mr. Brown should this Court grant certiorari and reverse the opinion of the Louisiana Supreme Court.

[3] The *State's Question Presented* no where references the Right to a Jury Trial, guaranteed Mr. Brown under the Sixth Amendment to the United States Constitution, and incorporated and applied to the States through the Fourteenth Amendment. Respondent discusses below the significant violation of his Sixth Amendment Rights that ensued from the proceedings in the trial court.

STATEMENT OF THE CASE

Quincy Brown was born on July 14, 1979. (Tr. XVII at 14). He was charged by bill of information with the armed robbery of Wayne Matthews on March 11, 1999, when he was a nineteen year old teenager (Tr. 1). Mr. Brown pled not guilty at the arraignment on May 27, 1999. On October 3, 2001, the case proceeded to trial before a jury. Later that same day, October 3, 2001, Mr. Brown was found guilty by an 11-1 vote. (Tr. 1520).[4]

At the initial sentencing, the trial court sentenced Mr. Brown to the maximum 99 years on the armed robbery despite the fact that this was young Mr. Brown's first adult conviction. At a later date, the State charged Mr. Brown by bill of information as an habitual offender, see La. R.S. 15:529.1, based solely on a single juvenile adjudication. (Tr. 5). At the habitual offender proceeding, the trial court, having already given Mr. Brown the maximum sentence, not only increased Mr. Brown's sentence -- she doubled it -- again giving him the maximum possible sentence of 198 years.

Quincy Brown timely appealed his conviction and sentence to the Fourth Circuit Court of Appeal. On May 28, 2003, the Fourth Circuit affirmed the conviction, but unanimously reversed the sentence in a written opinion. See State v. Brown, No. 2002-KA-1217 (La. App. 4th Cir. 5/29/03). As noted in the State's Petition for Certiorari, the Louisiana Supreme Court ultimately granted writs and issued an opinion upholding the decision of the intermediate court. See State v. Brown, 03-2788 (La. 07/06/04); 879 So. 2d 1276.

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[4] This Court denied Mr. Brown's Application for Certiorari of the denial on the appeal of his non-unanimous conviction. *Brown v. Louisiana*, 125 S. Ct. 158 (2004).

STATEMENT OF FACTS

The State's Petition omits a number of relevant facts.

A. The Charged Offense

The charged offense was a one eyewitness case. The state claimed that Wayne Matthews was robbed of the car he was driving in the area of Diana and Verret Streets at around 10:00 p.m. on the night of March 11, 1999. The only evidence against Quincy Brown, however, is Mr. Matthews. And Mr. Matthews himself was shown Quincy Brown's picture by the state on direct examination and testified that that was not the person who robbed him. (Tr. XVII at 87).[5]

In addition, although the car was recovered within a couple of hours in the same area from where it was supposed to have been taken and there were two people inside the car, neither occupant was Quincy Brown. Quincy Brown did not confess or make any inculpatory statements. There was simply nothing to corroborate Mr. Matthews' story.

Moreover, Mr. Matthews is a witness of extremely dubious reliability. To be charitable, Mr. Matthews, at best, presented as a bizarre individual whose testimony was variously incomprehensible, inconsistent and thoroughly impeached. As stated above, on direct examination by the state, Mr. Matthews testified that the picture of Quincy Brown was *not* the

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[5] No fingerprints, no DNA, no hair, and no fibers connect Quincy Brown to the incident. Although Mr. Matthews claimed a gun was used, no gun was recovered. Although Mr. Matthews claimed the gun was fired during the encounter inside the car, no bullet was found. Although Mr. Matthews claimed the gun was a semi-automatic, no shell casing was found. In addition, though the gun was supposed to have been fired inside a car, no gunpowder residue was found. In short, there is absolutely no physical evidence to corroborate Mr. Matthews or link Quincy Brown to this offense. (Tr. XVII at 132).

man who carjacked him. (Tr. XVII at 87).[6] When asked about what he was doing on the night of the incident, Mr. Matthews unblinkingly told the jury, "I'm look[ing] for [expletive deleted] if you want to know", brazenly using derogatory slang terminology for a part of the female anatomy. (Tr. XVII at 108).

Mr. Matthews also testified that he knew Quincy Brown from before the incident. However, Mr. Matthews himself initially told the police detective that "the perpetrator is unknown to me" (Tr. XVII at 132). Indeed, in his initial 911 call to the police moments after the incident supposedly happened, the 911 operator asks Mr. Matthews for a description of the perpetrator and Mr. Matthews never mentions the person's name and simply gives a clothing description.[7]

The circumstantial evidence strongly suggests that Mr. Matthews was cruising the neighborhood in search of drugs, and was either ripped off by his dealer or rented his car for a

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[6] Ultimately, after Mr. Matthews was pressed with leading questions, over repeated defense objection, the state got Mr. Matthews to say that it was Quincy Brown who had robbed him. (Tr. XVII at 89-90).–

[7] This makes no sense at all. Obviously, if Mr. Matthews knew Quincy Brown from before and Quincy Brown was in fact the perpetrator, Mr. Matthews would not have simply given a clothing description and said the perpetrator is unknown to me. In addition, during his testimony, Mr. Matthews repeatedly said that he suffered from sleep apnea and could not "remember a lot of things." (Tr. XVII at 91). For example, when asked on direct examination by the state "to describe for the jury in a little bit more detail what exactly happened that night" Mr. Matthews responded, "I'll do the best I could. I mean, I got sleep apnea. I don't remember a lot of things." Id. This, although Mr. Matthews also testified that he was a truck driver. (Tr. XVII at 99). Further, when confronted with inconsistencies in his testimony, missing details, or things that just did not make any sense, Mr. Matthews would respond with statements like "I can't remember everything from one minute to the next." (Tr. XVII at 109). For example, when confronted with the fact that he told the detective right after the incident that it happened very quickly, while at trial he testified that it lasted about 20 minutes, Mr. Matthews responded, "I also told you I have sleep apnea. I can't remember everything from one minute to the next." Id.

short period of time in exchange for drugs and then became concerned about getting it back. This corner was known for the distribution of drugs – a dark street with various abandoned houses known for little else. And supposedly, Mr. Matthews drove around the block for ten minutes talking with the person he later claimed robbed him. (Tr. XVII at 106).

Moreover, Mr. Matthews conceded that a crack pipe was found in his car. (Tr. VXII at 110-112). Mr. Matthews claimed that it was not his. Id. Mr. Matthews himself, however, prevented the pipe from ever being tested to show who it belonged to because he threw it away. Id. In order to avoid the appearance that he was covering up, Mr. Matthews then claimed that the police told him to throw away this crucial piece of physical evidence. Id. The police did not back up Mr. Matthews story. [8]

Finally, while Mr. Matthews' direct examination by the state began with his testimony that the picture of Quincy Brown was not the person who robbed him, it ended equally unsupportive of the state with his description of the condition of the car when he got it back just a few hours later. According to Mr. Matthews, the only difference in the car was that when the car was taken it was empty of gas, and when it was returned it was full.[9]

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[8] Further, while on the witness stand Mr. Matthews told this truly bizarre story about paying for sex with two separate women named Anna and Tasha. As it turns out, Anna and Tasha were cousins. According to Mr. Matthews, "I was having fun." (Tr. XVII at 100). Mr. Matthews then revealed that at some point prior to the alleged incident, he learned that Quincy Brown is Tasha's boyfriend. According to Mr. Matthews, while at Anna's house, he saw Quincy and Tasha together and was unhappy to learn that Quincy was Tasha's boyfriend.

[9] Thus, much to the prosecutor's surprise and chagrin, Mr. Matthews testified:

Q. And could you describe what kind of condition it was in after you got it back?

A. Well when they took it, it was empty. When I got it back it was full

The jury that convicted Mr. Brown was not unanimous.[10]

B. <u>The Juvenile Adjudication</u>

When a child, fourteen year old Quincy Brown was "adjudicated" for complicity in an attempted second degree murder. His statement, which provided the *entire* case against him, reflected that he was not guilty of this offense:

> I was at Diana and Verret St. across from the church when Lowdown [Ron Brown] walked up. He was talking to [a] boy named Leroy in a car and he had seen [me] and he asked me if I had seen Syble. I told him that the last time I had seen her was around the corner. He said come on and let's go walk around there, I have to ask her something. He said for me to go on around the corner and tell her to meet him at the corner. I went around by Belleville St. and found her and told her that Lowdown wanted to tell her something. She ask me where he was at and I told her that he was around the corner. She said where at and I told her that she was at the side street by Socrates and Bellville St. She told me to walk her to the corner so I walked to the corner and then I went back to where I was. I heard shooting from Bellville and Socrates St. I ran back around there and asked Johnny and Bebe what happened. They didn't know so I went to the corner where everybody was standing. I saw Syble stumbling around and I asked her what had happened. She told me to leave her alone. And she was falling and I picked her [up] and her face was bloody. She told me ["]Lowdown shot me.["] I walked her to her sister in law house. The man there wouldn't call an ambulance. I walked her back to Diana and Vallette St. and I told Damien to go call an ambulance and I went to wash the blood off my hand.

(Tr. 1297). There was no evidence that Quincy took part in this crime – indeed, the evidence

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Q. of what?

A. Gas.

Q. So it came back with a full tank of gas?

A. Right

(Tr. XVII at 94).

[10] A cross-petition raising the constitutionality of non-unanimous jury verdicts is filed contemporaneous to this Brief in Opposition.

showed that he later tried to help the victim. Neither "Lowdown" Brown (no relation of Quincy's) nor any other witness provided any evidence that Quincy knew what "Lowdown" was going to do. The only crime Quincy committed was to tell a woman that "Lowdown" wanted to see her. [11]

The use of this adjudication presents a paradox entwined in various anomalies. The young Mr. Brown could not have possibly committed any crime in relation to this charge if "Lowdown" Brown was innocent of the allegations. Lowdown was an adult, and was therefore permitted a jury trial. The jury ultimately acquitted Lowdown of the offense, thereby illustrating the immense importance of the jury trial in our constitutional scheme. Yet Mr. Brown, with no evidence establishing that he was an accessory, let alone as a principle, was adjudicated delinquent by the juvenile judge.

From these facts, uncontested by the state, Mr. Brown was sentenced to 198 years in prison. Half of this sentence arose from facts never in the purview of a jury.

SUMMARY OF ARGUMENT

In Almendarez-Torres v. United States, 523 U.S. 224 (1998), this Court held that a prior adult felony criminal conviction, could be used to increase a sentence beyond the statutory maximum for the crime charged without the necessity of being separately charged in the indictment.

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[11]The violation of Quincy Brown's rights did not end with the "trial." Quincy Brown was never advised of his right to appeal his conviction and sentence, or of his right to seek post-conviction relief in this case. (Tr. 1302). The unrebutted testimony in the lower court proved that his adjudication was therefore constitutionally defective, *and* that he suffered prejudice from this. Mr. Brown does not mean to suggest that he has a burden of proving prejudice. Where a juvenile is absolutely denied the panoply of constitutional rights, including the right to a jury trial, that adjudication cannot be used to enhance an adult sentence.

In this case, the State seeks to extend the Almendarez-Torres exception for prior adult felony convictions to juvenile adjudications.

In Jones v. United States, 525 U.S. 227 (1999), this Court explained that the Almendarez-Torres' prior adult conviction exception is grounded upon a definition of prior convictions as only those "established through procedures satisfying the fair notice, reasonable doubt *and jury trial guarantees*." Jones, 525 U.S. at 249 (emphasis added).

In Apprendi v. New Jersey, 530 U.S. 466 (2000), this Court held that any fact which increases the potential sentence beyond the statutory maximum must be proven to the jury beyond a reasonable doubt. Apprendi, 530 U.S. at 497.

When faced with the question of whether the State could enhance an adult conviction with an juvenile adjudication, the Louisiana Supreme Court correctly observed that juvenile adjudications could not be used to enhance an adult sentence under the *Apprendi* rule because the "'Prior convictions' are excepted from the *Apprendi* holding only because they were the product of proceedings that afforded crucial procedural protections - particularly fair notice, the right to jury trial and proof beyond a reasonable doubt." While the Court found that juvenile adjudications "can be reliably and constitutionally obtained without the right to a jury trial, this is because the juvenile proceeding is a "civil" proceeding with a focus on rehabilitation and non-criminal treatment of the adjudicated delinquent." Brown, at 1290.

The State, in its Petition for Certiorari asserts that the "crucial dissemination under Appendi is whether the fact used to enhance the sentence is an element of the offense or a sentencing factor." State's Petition at 6. The State then asserts, at State's Petition, 8, that the juvenile adjudication is not an element of an offense but a sentencing factor. This argument misstates the jurisprudence of

this Court and does not merit the attention of a grant of certiorari.

ARGUMENT

I. There Is No Need to Grant Certiorari as *Jones*, *Apprendi*, And *Blakely* Clearly Prohibit The Use Of Juvenile Judicial Adjudications To Enhance An Adult Sentence Beyond The Statutory Maximum

There is no need to grant certiorari as *Jones*, *Apprendi*, and *Blakely* clearly prohibit the use of juvenile judicial adjudications to enhance an adult sentence beyond the statutory maximum. Ten (even five) years ago it might have been an open question, whether the state could use a juvenile adjudication – where there was no right to a jury trial – to enhance an adult sentence beyond the statutory maximum.[12] Since this Court's decision in Apprendi, and the now after the ensuing decisions in Ring and Blakely, it is abundantly clear that a juvenile adjudication where there was no right to a jury trial cannot be used to enhance an adult sentence.

A. Introduction

At the outset, it is important to recognize that Quincy Brown's right to have every fact affecting the maximum adult criminal sentence he faced subject to determination by a jury of his peers is no mere formality. Rather, this right is the very foundation of our entire system of criminal justice, and indeed our constitutional form of government in the United States. As this Court emphasized in Apprendi v. New Jersey, 530 U.S. 466:

> At stake in this case are constitutional protections of surpassing importance: the proscription of any deprivation of liberty without "due process of law," Amdt. 14, and the guarantee that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury," Amdt. 6. Taken together, these

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[12] Cf Almendarez-Torres, 523 U.S. 224 (1998) (allowing prior adult felony conviction to enhance adult sentence).

> rights indisputably entitle a criminal defendant to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *United States v. Gaudin, 515 U.S. 506, 510, 132 L. Ed. 2d 444, 115 S. Ct. 2310 (1995);* see also *Sullivan v. Louisiana, 508 U.S. 275, 278, 124 L. Ed. 2d 182, 113 S. Ct. 2078 (1993); Winship, 397 U.S. at 364* ("The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged").
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> As we have, unanimously, explained, *Gaudin, 515 U.S. at 510-511,* the historical foundation for our recognition of these principles extends down centuries into the common law. "To guard against a spirit of oppression and tyranny on the part of rulers," and "as the great bulwark of [our] civil and political liberties," 2 J. Story, Commentaries on the Constitution of the United States 540-541 (4th ed. 1873), trial by jury has been understood to require that "the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours . . . ." 4 W. Blackstone, Commentaries on the Laws of England 343 (1769) (hereinafter Blackstone) (emphasis added). See also *Duncan v. Louisiana, 391 U.S. 145, 151-154, 20 L. Ed. 2d 491, 88 S. Ct. 1444 (1968).*

Apprendi, 530 U.S. at 476-77 (emphasis added) (footnote omitted). Accordingly, in Apprendi the United States Supreme Court held that the Fourteenth Amendment's Due Process Clause imposes upon the States the constitutional requirement that any fact which increases the potential sentence beyond the statutory maximum must be established through procedures honoring the right to fair notice (indictment), trial by jury and proof beyond a reasonable doubt. Apprendi, 530 U.S. at 497.

At issue in Apprendi was New Jersey's hate crime legislation which provided for a sentence enhancement beyond the statutory maximum for the offense if the offense was motivated by racial bias. The New Jersey statute provided that the enhancement would apply if the racial animus were proven by a preponderance of the evidence (rather than beyond a reasonable doubt), to the satisfaction of judge (as opposed to the jury). In striking down the New Jersey statute, the United States Supreme Court found that both prongs of the statute – both the lesser standard of proof and

the change in factfinder from jury to judge, violated due process.[13] Thus, the High Court held:

> Our answer to th[is] question was foreshadowed by our opinion in *Jones v. United States, 526 U.S. 227, 143 L. Ed. 2d 311, 119 S. Ct. 1215 (1999)*, construing a federal statute. We there noted that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *526 U.S. at 243, n. 6.* The Fourteenth Amendment commands the same answer in this case involving a state statute.

Apprendi, 530 U.S. at 476.

In this regard, it is important to understand that the source of the supposed "exception" for prior adult convictions, upon which the state relies here, is not Apprendi. Rather, the source of this "exception" is the Supreme Court's opinion in Almendarez-Torres.

B. The *Almendarez-Torres -- Jones -- Apprendi* Saga

In Almendarez-Torres, 523 U.S. 224 (1998), this Court held that a prior adult felony conviction could be used by the judge to increase the maximum sentence for the crime of illegal re-entry into the United States from two years to twenty years without the necessity of presenting the prior felony element to the grand jury for indictment.[14] Almendarez-Torres was decided in 1998 by a closely divided 5-4 Court over a vigorous dissent authored by Justice Scalia.

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[13] Indeed, the Court specifically characterized the right to trial by jury and the right to proof beyond a reasonable doubt as "equally well founded . . . companion right[s]" Apprendi, 530 U.S. at 477.

[14] Notably, Alemendarez-Torres did not challenge the identity of the factfinder (judge rather than jury), which is what is at issue here, or the burden of proof used (preponderance rather than beyond a reasonable doubt). He only challenged the government's failure to provide adequate notice by specifically indicting him under the enhancement provision with the prior conviction as an element of that offense. See Almendarez-Torres, 523 U.S. at 227; see also Jones, 526 U.S. at 248-49 ("the case is not dispositive of the question here . . . because we are concerned with the Sixth Amendment right to jury trial and not alone the rights to indictment and notice as claimed by Almendarez-Torres).

In his dissent in Almendarez-Torres, Justice Scalia raised for what appears to be the first time the issue of what facts must be subjected to the constitutional requirements of fair notice (indictment), proof beyond a reasonable doubt, and proof to a jury. Thus, Justice Scalia wrote:

> That it is genuinely doubtful whether the Constitution permits a judge (rather than a jury) to determine by a mere preponderance of the evidence (rather than beyond a reasonable doubt) a fact that increases the maximum penalty to which a criminal defendant is subject, is clear enough from our prior cases resolving questions on the margins of this one.

Almendarez-Torres, 523 U.S. at 251 (Scalia, J. dissenting) (citing In re Winship, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S.Ct. 1068 (1970); Mullaney v. Wilbur, 421 U.S. 684 (1975),; Patterson v. New York, 432 U.S. 197, 210 (1977). Although, Justice Scalia's opinion did not garner a majority of the High Court in 1998, as it turned out Almendarez-Torres was not end of the story, but merely the opening salvo.

One year later, in Jones v. United States, 526 U.S. 227 (1999), this Court held that the Fifth Amendment's Due Process Clause and the Sixth Amendment's guarantee of the right to trial by jury required that any fact that increased the maximum penalty to which the defendant is exposed is an element of the offense that must be indicted and subject to proof beyond a reasonable doubt to a jury of one's peers. In so doing, the Supreme Court specifically distinguished Almendarez-Torres, and its holding regarding prior adult felony convictions, because the prior conviction was itself previously established through procedures satisfying the constitutional requirements of notice (indictment), proof beyond a reasonable doubt and the right to trial by jury. As the Court put it:

> One basis for that possible constitutional distinctiveness [between prior adult felony convictions and other facts] is not hard to see: unlike virtually any other consideration used to enlarge the possible penalty for an offense, and certainly unlike the factor before us in this case, a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees. *Almendarez-Torres* cannot, then, be read to resolve the due process and

Sixth Amendment questions implicated . . . as the Government urges.

Jones, 526 U.S. at 249.

Thus, this Court explained that its holding in Almendarez-Torres regarding prior adult felony convictions is limited to facts "established through procedures satisfying the fair notice, reasonable doubt *and jury trial guarantees*." Id. at 249-50 (emphasis added). Where prior adult felony convictions are concerned, the factual basis for the increase in the maximum punishment has already been determined in accord with the constitutional guarantees to notice, proof beyond a reasonable doubt, and the right to trial by jury. Therefore, none of those fundamental constitutional rights are offended by increasing the maximum sentence based upon the prior conviction.

The majority in Jones was comprised of the Justices who joined Justice Scalia's dissent in Almendarez-Torres with the addition of Justice Thomas, who had sided with the majority in Almendarez-Torres. Scrutiny of the concurring and dissenting opinions in Jones confirms that in Jones, this Court appears to have embraced Justice Scalia's reasoning in his Almendarez-Torres dissent. Justice Scalia's concurrence, in its entirety states:

> In dissenting in *Almendarez-Torres v. United States, 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998),* I suggested the possibility, and in dissenting in *Monge v. California, 524 U.S. 721, 118 S. Ct. 2246, 2255-2257, 141 L. Ed. 2d 615 (1998),* I set forth as my considered view, that it is unconstitutional to remove from the jury the assessment of facts that alter the congressionally prescribed range of penalties to which a criminal defendant is exposed. Because I think it necessary to resolve all ambiguities in criminal statutes in such fashion as to avoid violation of this constitutional principle, I join the opinion of the Court.

Id. at 254 (Scalia, J., concurring) (emphasis added).

In a similar vein, Justice Stevens wrote in his concurrence:

> Like JUSTICE SCALIA, see *post,* at 1, I am convinced that it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.

> It is equally clear that such facts must be established by proof beyond a reasonable doubt. That is the essence of the Court's holdings in *In re Winship, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970), Mullaney v. Wilbur, 421 U.S. 684, 44 L. Ed. 2d 508, 95 S. Ct. 1881 (1975),* and *Patterson v. New York, 432 U.S. 197, 53 L. Ed. 2d 281, 97 S. Ct. 2319 (1977).* To permit anything less "with respect to a fact which the State deems so important that it must either be proved or presumed is impermissible under the Due Process Clause." *432 U.S. at 215.* This principle was firmly embedded in our jurisprudence through centuries of common law decisions. *See, e.g., Winship, 397 U.S. at 361-364; Duncan v. Louisiana, 391 U.S. 145, 151-156, 20 L. Ed. 2d 491, 88 S. Ct. 1444 (1968).* . . .If *McMillan v. Pennsylvania, 477 U.S. 79, 91 L. Ed. 2d 67, 106 S. Ct. 2411 (1986),* and Part II of the Court's opinion in *Walton v. Arizona, 497 U.S. 639, 647-649, 111 L. Ed. 2d 511, 110 S. Ct. 3047 (1990),* departed from that principle, as I think they did, see *McMillan, 477 U.S. at 95-104* (STEVENS, J., dissenting) and *Walton, 497 U.S. at 709-714* (STEVENS, J., dissenting), they should be reconsidered in due course. It is not, however, necessary to do so in order to join the Court's opinion today, which I do.

Id. at 252-53 (Stevens, J., concurring) (emphasis added).

While the dissenting Justices in Jones disagreed with the majority's defacto overruling of Almendarez-Torres, which had only been decided one year earlier, there was absolutely no doubt in their minds, as in the minds of the Jones' majority, that that is exactly what the Court's opinion in Jones meant.[15]

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[15] Thus, the dissent complained:

> Had it involved simply a question of statutory interpretation, the majority opinion would not have been cause for much concern. Questions of statutory interpretation can be close but nonetheless routine. That should have been so in today's case. The Court, however, is unwilling to rest its opinion on textual analysis. Rather, to bolster its statutory interpretation, the Court raises the specter of "'grave and doubtful constitutional questions,'" *ante*, at 12, without an adequate explanation of the origins, contours, or consequences of its constitutional concerns. The Court's reliance on the so-called constitutional doubt rule is inconsistent with usual principles of *stare decisis* and contradicts the approach followed just last Term in *Almendarez-Torres v. United States, 523 U.S. 224, 140 L. Ed. 2d 350, 118 S. Ct. 1219 (1998).* Our precedents admit of no real doubt regarding the power of Congress to establish serious bodily injury and death as sentencing factors rather than offense elements, as we made clear in *Almendarez-Torres.* Departing from this recent authority, the Court's sweeping constitutional

Jones represents a watershed shift whereby the reasoning of Justice Scalia's dissent in Almendarez-Torres, "that it is unconstitutional to remove from the jury the assessment of facts that alter the congressionally prescribed range of penalties to which a criminal defendant is exposed," Apprendi at 254, essentially became the law of the land.

Any doubt about this watershed change in constitutional law was subsequently removed with the Supreme Court's decision the very next year in Apprendi. In Apprendi, after a thorough and extended fifteen page survey of the history of the right to trial by jury and requirement of proof beyond a reasonable doubt in criminal cases, the Supreme Court reaffirmed its holding in Jones and extended it to the States. In Jones, the Court had held that the Fifth Amendment's Due Process Clause and the Sixth Amendment's guarantee of the right to trial by jury required that *in a federal case* any fact that increased the maximum adult criminal punishment had to be subject to proof beyond a reasonable doubt to a jury.

In Apprendi, the Court made this requirement *applicable to the States* through the Fourteenth Amendment's Due Process Clause. Thus, the Court held that the Fourteenth Amendment, like the Fifth Amendment, imposes upon the States a requirement that any fact that increases the penalty for a crime beyond the prescribed statutory maximum is an element of a new offense that must be submitted to a jury and proven beyond a reasonable doubt. As the High Court stated:

> In sum, our reexamination of our cases in this area, and of the history upon

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> discussion casts doubt on sentencing practices and assumptions followed not only in the federal system but also in many States. Thus, among other unsettling consequences, today's decision intrudes upon legitimate and vital state interests, upsetting the proper federal balance. I dissent from this unfortunate and unnecessary result.

Id. at 254 (emphasis added).

> which they rely, confirms the opinion that we expressed in Jones. . . ."It is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." *526 U.S. at 252-253* (opinion of STEVENS, J.); see also *526 U.S. at 253* (opinion of Scalia, J.).

Apprendi, 530 U.S. at 491 (emphasis added).[16]

In addition, the majority explained why Almendarez-Torres did not control and reiterated what distinguished the Almendarez-Torres exception for prior adult felony convictions. As the Court explained:

> Rejecting Almendarez-Torres' objection, we concluded that sentencing him to a term higher than that attached to the offense alleged in the indictment did not violate the strictures of *Winship* in that case. Because Almendarez-Torres had admitted the three earlier convictions for aggravated felonies -- all of which had been entered pursuant to proceedings with substantial procedural safeguards of their own -- no question concerning the right to a jury trial or the standard of proof that would apply to a contested issue of fact was before the Court.

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[16] Indeed, in decrying the Court's ruling in Apprendi, the dissent explicitly acknowledged the import of the Court's decision. Thus, Justice O'Connor writes:

> Last Term, in *Jones v. United States, 526 U.S. 227, 143 L. Ed. 2d 311, 119 S. Ct. 1215 (1999),* this Court found that our prior cases suggested the following principle: "Under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *526 U.S. at 243, n. 6.* At the time, JUSTICE KENNEDY rightly criticized the Court for its failure to explain the origins, contours, or consequences of its purported constitutional principle; for the inconsistency of that principle with our prior cases; and for the serious doubt that the holding cast on sentencing systems employed by the *Federal Government and States alike. 526 U.S. at 254, 264-272* (dissenting opinion). Today, in what will surely be remembered as a watershed change in constitutional law, the Court imposes as a constitutional rule the principle it first identified in Jones.

Apprendi, 530 U.S. at 524 (emphasis added).

Apprendi, 530 U.S. at 488 (emphasis added). Thus, the Court reiterated the limitation on the Almendarez-Torres exception to convictions established pursuant to proceedings guaranteeing the right to proof beyond a reasonable doubt and trial by jury.

But the Court's discussion of Almendarez-Torres did not end there. Rather, the Court went on to acknowledge that logically its reasoning in Jones and Apprendi is flatly inconsistent with Almendarez-Torres and requires elimination of the exception for prior adult felony convictions. Indeed, the Court's opinion explicitly states:

> Even though it is arguable that Almendarez-Torres was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested, Apprendi does not contest the decision's validity and we need not revisit it for purposes of our decision today to treat the case as a narrow exception to the general rule we recalled at the outset. Given its unique facts, it surely does not warrant rejection of the otherwise uniform course of decision during the entire history of our jurisprudence.

Apprendi, 530 U.S. at 489-90. [17]

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[17] Thus, by the time of Apprendi, a majority of the Supreme Court recognizes that Almendarez-Torres itself was incorrectly decided, and that even the exception for prior *adult* convictions violates due process. Any remaining scintilla of doubt about this is removed by Justice Thomas' concurrence in Apprendi. In Almendarez-Torres Justice Thomas had sided with the majority providing the critical fifth vote that created the "exception" for prior adult felony convictions. Two years later, concurring in Apprendi Justice Thomas, writing for himself and Justice Scalia, reversed field and flatly states that Almendarez-Torres was wrongly decided:

> The consequence of the above discussion for our decisions in Almendarez-Torres and McMillan should be plain enough, but a few points merit special mention.
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> * * * *
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> Second, and related, one of the chief errors of Almendarez-Torres -- an error to which I succumbed -- was to attempt to discern whether a particular fact is traditionally (or typically) a basis for a sentencing court to increase an offender's sentence. *523 U.S. at 243-244;* see *id. at 230, 241.* For the reasons I have given, it should be clear that this approach just defines away the real issue. What matters is the way by which a fact enters into the sentence. If a fact is by

Any question whether Apprendi was here to say has been answered by this Court's decision in Blakely v. Washington, which made clear:

> Ultimately, our decision cannot turn on whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice. One can certainly argue that both these values would be better served by leaving justice entirely in the hands of professionals; many nations of the world, particularly those following civil-law traditions, take just that course. There is not one shred of doubt, however, about the Framers' paradigm for criminal justice: not the civil-law ideal of administrative perfection, but the common-law ideal of limited state power accomplished by strict division of authority between judge and jury. As Apprendi held, HN13every defendant has the right to insist that the prosecutor prove to a jury all facts legally essential to the punishment. Under the dissenters' alternative, he has no such right. That should be the end of the matter

Blakely v. Washington, 124 S. Ct. 2531, 2543 (2004)

C. Conclusion

Accordingly, scrutiny of the Almendarez-Torres, Jones, and Apprendi triumvirate makes at least two points salient to the juvenile adjudication issue crystal clear. First, to the extent that the

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> law the basis for imposing or increasing punishment -- for establishing or increasing the prosecution's entitlement -- it is an element. (To put the point differently, I am aware of no historical basis for treating as a nonelement a fact that by law sets or increases punishment.) When one considers the question from this perspective, it is evident why the fact of a prior conviction is an element under a recidivism statute. Indeed, cases addressing such statutes provide some of the best discussions of what constitutes an element of a crime. One reason frequently offered for treating recidivism differently, a reason on which we relied in Almendarez-Torres, supra, at 235, is a concern for prejudicing the jury by informing it of the prior conviction. But this concern, of which earlier courts were well aware, does not make the traditional understanding of what an element is any less applicable to the fact of a prior conviction. See, e.g., *Maguire, 47 Md. at 498; Sickles, 156 N.Y. at 547, 51 N.E. at 290.*

Apprendi, 530 U.S. at 519-21 (Thomas, J. concurring) (footnote omitted).

Almendarez-Torres prior adult felony conviction exception remains at all, it is clearly restricted to convictions established through procedures guaranteeing the rights to fair notice (indictment), proof beyond a reasonable doubt and trial by jury. This is explicitly stated in both Jones and Apprendi.[18]

Perhaps more importantly, the Almendarez-Torres prior adult felony conviction exception, which the state is trying to extend here, really no longer exists. In Jones, Justice Thomas, who provided the crucial fifth vote creating Almendarez-Torres, aligns himself with the Almendarez-Torres dissenters to create a new majority. The next year, in Apprendi, Justice Thomas writes flat-out that he was in error in Almendarez-Torres and that that case is wrongly decided. The Opinion of the Court in Apprendi could not be more blunt about the continuing vitality of Almendarez-Torres and bears repeating:

> Even though it is arguable that Almendarez-Torres was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested, Apprendi does not contest the decision's validity and we need not revisit it for purposes of our decision today to treat the case as a narrow exception to the general rule we recalled at the outset. Given its unique facts, it surely does not warrant rejection of the otherwise uniform course of decision during the entire history of our jurisprudence.

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[18] See Jones, 526 U.S. at 249 ("unlike the factor before us in this case, a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees. *Almendarez-Torres* cannot, then, be read to resolve the due process and Sixth Amendment questions implicated . . . as the Government urges."); Apprendi, 530 U.S. at 496 ("[T]here is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof."); see also Apprendi, 530 U.S. at 488 ("Rejecting Almendarez-Torres' objection, we concluded that sentencing him to a term higher than that attached to the offense alleged in the indictment did not violate the strictures of *Winship* in that case. Because Almendarez-Torres had admitted the three earlier convictions for aggravated felonies -- all of which had been entered pursuant to proceedings with substantial procedural safeguards of their own -- no question concerning the right to a jury trial or the standard of proof that would apply to a contested issue of fact was before the Court.").

Apprendi, 530 U.S. at 489-90.

II. Mr. Brown's Juvenile Adjudication – *During Which He Had No Right to a Jury Trial* – Was Unconstitutionally Used to Enhance His Sentence 99 Years above the Maximum

Mr. Brown was convicted of armed robbery and sentenced to 99 years in prison. The State then filed a bill of information charging Mr. Brown as a habitual offender, and used Mr. Brown's juvenile adjudication – at which he had no right to a jury trial – to enhance his sentence, in this case by 99 years. The state attempts to argue that this is acceptable because the prior adjudication is a sentencing factor not an element. State's Petition at 8,10. This act of imaginative lexicography is flatly contradicted by this Court's jurisprudence – which has held that it doesn't matter what a fact is called, but only matters what a fact does:

> What matters is the way by which a fact enters into the sentence. If a fact is by law the basis for imposing or increasing punishment -- for establishing or increasing the prosecution's entitlement -- it is an element. (To put the point differently, I am aware of no historical basis for treating as a nonelement a fact that by law sets or increases punishment.) When one considers the question from this perspective, it is evident why the fact of a prior conviction is an element under a recidivism statute. Indeed, cases addressing such statutes provide some of the best discussions of what constitutes an element of a crime. One reason frequently offered for treating recidivism differently, a reason on which we relied in Almendarez-Torres, supra, at 235, is a concern for prejudicing the jury by informing it of the prior conviction. But this concern, of which earlier courts were well aware, does not make the traditional understanding of what an element is any less applicable to the fact of a prior conviction. See, e.g., *Maguire, 47 Md. at 498; Sickles, 156 N.Y. at 547, 51 N.E. at 290.*

Apprendi, 530 U.S. at 519-21 (Thomas, J. concurring) (footnote omitted). As this Court made clear in Ring v. Arizona, 536 U.S. 584 (2002):

> The dispositive question [under Apprendi] "is one not of form, but of effect." If a State makes an increase in a defendant's authorized punishment contingent on the finding of fact, that fact -- no matter how the State labels it -- must be found by a jury

beyond a reasonable doubt.

Ring, 536 U.S. at 602 (quoting Apprendi, 530 U.S. at 494) (emphasis added). In case it was not clear enough, Justice Scalia put it bluntly:

> All facts essential to the imposition of the level of punishment that the defendant receives -- whether the statute calls them elements of the offense, sentencing factors, or Mary Jane -- must be found by the jury beyond a reasonable doubt.

Ring, 536 U.S. at 610 (Scalia, J., concurring)

Indeed, in the face of complaint that this Court might be *de facto* holding the entire federal sentencing scheme unconstitutional, this Court made clear that the right to a jury determination of all facts used to enhance a sentence was not a luxury:

> Our commitment to Apprendi in this context reflects not just respect for longstanding precedent, but the need to give intelligible content to the right of jury trial. That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary. See Letter XV by the Federal Farmer (Jan. 18, 1788), reprinted in 2 The Complete Anti-Federalist 315, 320 (H. Storing ed. 1981) (describing the jury as "secur[ing] to the people at large, their just and rightful controul in the judicial department"); John Adams, Diary Entry (Feb. 12, 1771), reprinted in 2 Works of John Adams 252, 253 (C. Adams ed. 1850) ("[T]he common people, should have as complete a control . . . in every judgment of a court of judicature" as in the legislature); Letter from Thomas Jefferson to the Abbe Arnoux (July 19, 1789), reprinted in 15 Papers of Thomas Jefferson 282, 283 (J. Boyd ed. 1958) ("Were I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it [***19] is better to leave them out of the Legislative"); Jones v. United States, 526 U.S. 227, 244-248, 143 L. Ed. 2d 311, 119 S. Ct. 1215 (1999). Apprendi carries out this design by ensuring that the judge's authority to sentence derives wholly from the jury's verdict. Without that restriction, the jury would not exercise the control that the Framers intended.

Blakely v. Washington, 124 S. Ct. 2531, 2538-2539 (2004)

The state suggests that Mr. Brown received a constitutionally permissible amount of process because a judge

> at a multiple bill hearing where the State had the burden of proving the elements of Louisianas' Habitual Offender Statute, namely that Mr. Brown had been adjudicated in a juvenile proceeding of attempted second degree murder. . . . Moreover, Brown's adjudication was reliably determined in a proceeding which satisfied constitutional standards, including the right to notice, right to counsel right to confront and cross examine witnesses and the privilege against self-incrimination.

State's Petition at 9.[19]

This Court has made clear that the text of the Constitution, and not our (or rather the judiciary's) assessment of that which is reliable, is required.[20]

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[19]To be sure, what must be proven to a jury must be proven beyond a reasonable doubt (after fair notice, with the right to counsel, at a hearing at which a defendant has the right to confront and cross-examine witnesses). But, first and foremost, Jones and Apprendi are all about what facts must be determined by a jury. To suggest otherwise is utter nonsense. In both Jones and Apprendi the Court discusses at length, over nine pages in Jones, see Jones, 526 U.S. 240-49, and over fifteen pages in Apprendi, see Apprendi, 530 U.S. at 476-91, the central importance of the right to trial by jury and its historical development in connection with our Constitution. This is what these cases are about – the right to trial by jury -- what facts must be submitted to a jury, and what facts need not be. Thus, Justice Scalia, who first raised the issue in his Almendarez-Torres dissent, in Jones, presents the issue explicitly:

> In dissenting in *Almendarez-Torres v. United States, 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998),* I suggested the possibility, and in dissenting in *Monge v. California, 524 U.S. 721, 118 S. Ct. 2246, 2255-2257, 141 L. Ed. 2d 615 (1998),* I set forth as my considered view, that it is unconstitutional to remove from the jury the assessment of facts that alter the congressionally prescribed range of penalties to which a criminal defendant is exposed.

Id. at 254 (Scalia, J., concurring) (emphasis added). Similarly, Justice Stevens wrote:

> Like JUSTICE SCALIA, see *post,* at 1, I am convinced that it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.

Id. at 252-53 (Stevens, J., concurring) (emphasis added). Accordingly, Jones and Apprendi stand for more than the proposition that is sufficient if facts that increase prescribed range of penalties are submitted to a jury. Rather, submission of such facts to the jury is a constitutional imperative.

[20] See Crawford v. Washington, ___ U.S. ___, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) (making clear that hearsay which may be reliable must be excluded because it violates the text of

In Apprendi, and now Ring and Blakely, the Court has made clear that the Sixth Amendment requires a jury determination, and is not satisfied by a judicial finding – regardless of the burden of proof, and regardless of the other rights given to the defendant at the proceeding. For instance, at Blakely's sentencing, he too had "the right to counsel right to confront and cross examine witnesses and the privilege against self-incrimination." The Court found that without a jury determination, this was not sufficient.

Blakely, Ring, Jones and Apprendi are cases about the right to trial by jury and what facts must be found by a jury.[21] *The* issue in Blakely, Ring, Jones and Apprendi is *the right to trial by jury*. Therefore, to suggest that a Court could reduce those because the procedure was mostly "reliable" is untenable.

Finally, the state maintains that it is constitutional to use a juvenile adjudication to increase an adult criminal sentence beyond the statutory maximum because under McKeiver v. Pennsylvania, 403 U.S. 528 (1971), a determination by a judge is reliable enough to satisfy the due process

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the Sixth Amendment, which grants along with the right to a jury trial, the right to cross examination).

[21] Even the dissenters in Apprendi recognized this stating, "Today, in what will surely be remembered as a watershed change in constitutional law, *the Court imposes as a constitutional rule the principle it first identified in Jones*." Id. 530 U.S. at 524 (O'Connor, J. dissenting) (emphasis added). Similarly, Justice Scalia, in his concurrence, writes:

> What ultimately demolishes the case for the dissenters is that they are unable to say what the right to trial by jury does guarantee if, as they assert, it does not guarantee -- what it has been assumed to guarantee throughout our history -- the right to have a jury determine those facts that determine the maximum sentence the law allows. They provide no coherent alternative.

Apprendi, 530 U.S. at 498-99. Clearly, then, what is being debated is not merely what is sufficient under the Constitution, but what is a constitutional "rule" or "right" -- i.e. what is constitutionally mandated.

requirements for juvenile proceedings. In other words, because the judge's determination satisfied due process in the juvenile proceeding, it should satisfy due process here. The argument is a non-sequitur. Simply because certain procedures satisfy due process in one context, does not mean those same procedures satisfy due process in all contexts.[22]

Due process is a variable rather than a static concept. What process is due depends on what life, liberty or property interests are at stake, and specifically what the government seeks to take away from an individual. See Goldberg v. Kelly, 397 U.S. 254, 263, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970) (quoting Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961) ("consideration of what procedures due process may require under any given set of circumstances

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[22] Moreover, juvenile proceedings cannot be said to be reliable for purposes of imposing adult criminal punishment. It is well-known that juvenile court judges, faced with a clearly troubled youth in dire family circumstances, sometimes find factual "guilt" when a jury would not, simply so that the Court can then be in a position to reach out and help the child by requiring that the State provide services and special assistance. As this Court itself acknowledged:

> Indeed, affording juvenile offenders the right to trial by jury would tend to destroy the flexibility of the juvenile judge as the trier of fact, which allows the judge to take into consideration social and psychological factors, family background, and education in order to shape the disposition in the best interest of both the child and society.

In the Interest of D.J., 01-2149, (La. 05/14/02), 817 So. 2d 26, 33.

The juvenile adjudication at issue in this case is a prime example of the unreliability of juvenile proceedings for purposes of imposing adult criminal punishment. Quincy Brown was "adjudicated" based upon his statement. As recounted above, however, his statement made him guilty of nothing more than being present when another person committed a crime, and then attempting to assist the victim. Undoubtedly, this evidence was legally insufficient to support the adjudication. In fact, the adult perpetrator, with the right to trial by jury, was acquitted. As a juvenile, however, Quincy Brown, was never advised of his right to appeal his conviction and sentence, or of his right to seek post-conviction relief. (Tr. 1302). While there may be nothing that can be done now to right this injustice, it certainly means that there is no basis for compounding it based on theoretical arguments about the supposed "reliability" juvenile proceedings.

must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.")); see also Hannah v. Larche, 363 U.S. 420, 440, 442 (1960). The amount of process due for a parking ticket is vastly different, and much, much less, than the process that is due when the government charges a capital offense. Id. The reason is simple: in the case of the parking ticket the government is only seeking a small fine, while in the capital case the government is seeking to take away a person's life. Id. Accordingly, the procedures the government must satisfy are substantially greater and more onerous in a capital case than for a parking ticket. Id.

In McKeiver, as in In the Interest of D.J., the Court held that it was not necessary for the government to afford the accused the procedural protection of the right to trial by jury. In other words, the process due in juvenile court is less than the process due in adult criminal court. But the reason for this is that the nature of the interests at stake is less in the "civil like proceedings in the juvenile court." In the juvenile context, the government is not seeking to impose purely punitive adult criminal sanctions. Rather, the goal of the juvenile system is to rehabilitate and reform the wayward youth and set them on a path to becoming a responsible adult member of the community. These differences, therefore, justify a difference in procedures – i.e. the amount of process that is due.

In this case, however, the government is seeking to impose additional adult criminal sanctions. The question is not what process was due back in 1993 in juvenile court when the government was seeking to impose juvenile sanctions. The question is what process was due when the government sought to impose an additional adult criminal sanctions beyond the statutory maximum -- and an additional ninety-nine years at hard labor in an adult prison, at that. And on that

score the Constitution and Supreme Court's decision in Apprendi is absolutely clear. As Justice Scalia summed it up at the end of his concurring opinion in Apprendi,

> the guarantee that "in all criminal prosecutions, the accused shall enjoy the right to . . . trial, by an impartial jury" has no intelligible content unless it means that all the facts which must exist in order to subject the defendant to a legally prescribed punishment must be found by the jury.

Apprendi, 530 U.S. at 499 (emphasis added).

CONCLUSION

In arguing that it should be able to use juvenile adjudications, where there is no right to trial by jury, to subject Quincy Brown to additional adult criminal sanctions beyond that statutorily provided for the offense of which the jury convicted him, the state maintains that findings by a judge (or perhaps two) are reliable, and good enough. Justice Scalia's concurrence in Apprendi responds sufficiently to this proposition:

> The founders of the American Republic were not prepared to leave it to the State, which is why the jury-trial guarantee was one of the least controversial provisions of the Bill of Rights. It has never been efficient; but it has always been free. . . . JUSTICE BREYER proceeds on the erroneous and all-too-common assumption that the Constitution means what we think it ought to mean.
>
> It does not; it means what it says. And the guarantee that "in all criminal prosecutions, the accused shall enjoy the right to . . . trial, by an impartial jury" has no intelligible content unless it means that all the facts which must exist in order to subject the defendant to a legally prescribed punishment must be found by the jury.

Apprendi, 530 U.S. at 498-99.

The state's application for writ of certiorari should be denied. In the alternative, the judgment of the Louisiana Supreme Court should be affirmed.

Respectfully submitted,

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